Shepherd Tissue, Inc. *and* United Paperworkers International Union AFL–CIO, CLC, Petitioner. Case 26–RC–7710

August 26, 1998

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

The National Labor Relations Board, by a three-member panel, has considered objections to a second election held September 25 and 26, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 222 votes for and 149 votes against the Petitioner, with 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the Employer's exceptions[1] and the briefs of both the Employer and the Petitioner, has adopted the hearing officer's findings[2] and recommendations,[3] and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Paperworkers International Union, AFL–CIO, CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees, including shipping and warehouse employees, employed by the Employer at its Memphis, Tennessee facility; but excluding all office clerical employees, professional and technical employees, guards, team managers, and supervisors as defined in the Act.

CHAIRMAN GOULD, concurring.

I join my colleagues in adopting the hearing officer's recommendation to overrule the Employer's objections to the election and to certify the Petitioner as the unit employees' collective-bargaining representative. I write separately with regard to the Employer's Objection 2, alleging that the Petitioner injected racial considerations in the campaign in such a way as to destroy the laboratory conditions necessary for a valid election.

In my view, the *Sewell* prohibition is inapplicable in the instant case where the Petitioner, in a campaign handbill, included a statement by a discharged unit employee concerning a sexual harassment investigation that "black folk have been wrongly touched by whites for over 300 years." Racial remarks and campaigning which takes race into account involving the employer-employee relationship are part of the reality of the workplace and therefore a legitimate campaign issue. Such appeals are germane to the solidarity and the working conditions of a racial group during an organizing campaign and accordingly are not objectionable regardless of their truth or falsity. I would, however, find objectionable comments, like those in *Sewell*, which are not germane to the employment relationship and are designed to create or inflame an atmosphere of racial hatred. Further, I find objections based on racial appeals to be no different from other election objections and would therefore place the burden of proof on the party seeking to set aside the election.

As I have previously noted in my defense of both employee and employer free speech, freedom of expression in the workplace is secured by both the First Amendment and the National Labor Relations Act.[1] As the Court recognized in *NLRB v. Magnavox Co.*, "[t]he place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees."[2] The constitutional safeguard represents a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open."[3] As Justice Douglas stated in his dissent in *Beauharnais v. Illi-*

[1] We find no merit in the Employer's exception concerning the timeliness of the Petitioner's post-hearing brief filed with the hearing officer. The Board obtained from Region 26 the documentary information necessary to verify that the Petitioner's delivery service picked up the brief in question on December 4, 1997, the day before the due date. The brief was therefore timely. See Sec. 102.111(b) of the Board's Rules and Regulations.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In addition, the Employer contends in its exceptions that some of the hearing officer's findings and conclusions demonstrate bias and prejudice. On careful examination of the hearing officer's report and the entire record, we are satisfied that such contentions are without merit.

[3] Pertinent portions of the hearing officer's report are attached as an appendix.

In adopting the hearing officer's recommendation to overrule Objection 2, we find it unnecessary to rely on his observation that there was no evidence that James Harrell's remark to the Employer's Director of Human Resources caused any employee to alter his or her voting choice.

[1] See my separate opinions in *Caterpillar, Inc.*, 321 NLRB 1178, 1184–1185 (1996); *Eldorado Tool*, 325 NLRB 222 (1997); and *Hale Nani Rehabilitation & Nursing Center*, 326 NLRB No. 37 (1998).

[2] 415 U.S. 322, 325 (1974). See also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Although *Republic Aviation* does not contain the explicit language of *Magnavox*, the Court's rationale rests upon the premise that the workplace is the central forum for discussion about unionization.

[3] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In *Caterpillar, Inc.*, 321 NLRB at 1184 (1996), I found that employee activity that seeks to influence management policy is protected and noted that cases rising under Sec. 7 have drawn sustenance from the First Amendment decisions of the Court in *New York Times v. Sullivan* and its progeny, all of which promote wide open and robust speech as part of good public policy.

nois, "if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster."[4]

In 1941, the Court first recognized that an employer enjoys a free speech right to express opinions that are noncoercive in manner.[5] With the enactment of the Taft-Hartley Amendments, Congress expressly provided through Section 8(c) of the Act, that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." In attempting to balance the employer's free speech right with the equal right of employees to associate freely as guaranteed by Section 7 of the Act and protected by Section 8(a)(1) and the proviso to Section 8(c), the Court concluded that an employer may freely communicate his general views about unionization or his specific views about a particular union as long as that communication contains neither a threat of reprisal nor a promise of benefits.[6]

Employees as well as unions and their representatives enjoy a comparable right of free speech. Relying on its landmark decisions protecting First Amendment activity, the Court has recognized the free speech right of employees and of unions and their agents to discuss the advantages and disadvantages of unionization.[7] As the Court instructed in deeming the efforts of a union official to organize workers constitutionally protected, "[t]he right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."[8]

In *Sewell,* the Board did not prohibit the parties' discussion of race during representation elections. In that case, the Board set aside the election because the employer's campaign arguments were deemed inflammatory in character, designed to set white workers against black workers, and represented an appeal to racial animosity rather than to consideration of economic and social conditions and of possible actions to deal with them.[9] While the Board concluded in *Sewell* that appeals to racial prejudice on matters unrelated to either election issues or the union's activities create conditions which make impossible a sober, informed exercise of franchise, the Board noted that "[t]his is not to say that a relevant campaign statement is to be condemned because it may have racial overtones."[10] The Board concluded, however, that

> [s]o long, therefore, as the party limits itself to truthfully setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him. [Citations omitted. 138 NLRB 71–72.]

I am of the view that the basic principles of *Sewell* and its companion case, *Allen-Morrison Sign Co.*,[11] are correct. My departure from those holdings lies in the burden that is placed on the party making the racial appeal, in the requirement that the appeal be truthful and in the

[4] 343 U.S. 250, 284–285 (1952).

[5] *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941). I recognize that Sec. 8(c) has no application in representation cases. See *General Shoe Corp.*, 77 NLRB 124, 127 (1948). As the Board noted in *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1787 fn. 11 (1962), however, the "strictures of the First Amendment, to be sure, must be considered in all cases."

[6] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Under *Gissel*, the Board may limit what would otherwise constitute employer First Amendment rights only to condemn three types of statements: promise of benefits; threats of reprisals; and predictions of adverse economic consequences suggesting that the action will not occur out of economic necessity but because the employer will seek to penalize concerted activity.

[7] *Thomas v. Collins*, 323 U.S. 516, 532 (1945), and *Staub v. City of Baxley*, 355 U.S. 313 (1958). See *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966), where the Court applied constitutional protection to the speech of employees as it relates to the statutory scheme of the National Labor Relations Act. Accord: generally, *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972); *Inland Steel Co.*, 257 NLRB 125 (1981); *Borman's Inc. v. NLRB*, 676 F.2d 1188 (6th Cir. 1982); *Southern California Edison Co.*, 274 NLRB 1121 (1985); *Tyler Business Services*, 256 NLRB 567 (1981); and *Gatliff Coal Co. v. NLRB*, 953 F.2d 247 (6th cir. 1992). See also *Rankin v. McPherson*, 483 U.S. 378 (1987). Drawing inspiration from *Linn*, which relied on *New York Times v. Sullivan*, 376 U.S. 254 (1964), as a basis for determining what employee speech is protected under Sec. 7 and removed from state defamation and libel law, I relied upon the First Amendment authority in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in my separate opinion in *Caterpillar, Inc.*, 321 NLRB 1178, 1184–1185 (1996).

[8] *Thomas v. Collins*, 323 U.S. at 532 (1945).

[9] See *Baltimore Luggage*, 162 NLRB 1230 (1967).

[10] 138 NLRB at 71.

[11] 138 NLRB 73 (1962). In *Allen-Morrison*, the Board found nonobjectionable an employer's campaign letters that contrasted the employer's position on the issue of segregation, that each person is entitled to his own view, with the position of the "national unions" who have "taken the view that they are supposed to decide the question of segregation or integration and they have actively promoted integration." The letters had also included a copy of an article from "Militant Truth," a four-page monthly paper published in Greenville, South Carolina, concerning the international union's actions to prevent one of its local unions in a nearby town from financing a segregated school. The Board concluded that the employer did not resort "to inflammatory propaganda on matters in no way related to the choice before the voters, and we therefore decline to set the election aside." While the Board applied the appropriate standard, the result is incorrect. In my view, the application of the *Sewell* test to these facts requires the conclusion that the employer's racial appeal is one clearly intended to divide workers along racial lines. The effect of such an appeal is the creation of an unjustified clash of interests between groups of workers which tends to reduce the likelihood and effectiveness of their working in concert to achieve their legitimate goals under the Act.

unrealistic and inappropriate symmetry between unions and employers assumed by those decisions and their progeny.

In my view, regardless of whether the appeal is made by the employer or the union, the burden should be on the objecting party to establish that a racial remark is designed to incite racial hatred. Nor would I find that the truth or falsity of the racial appeal is relevant to the determination of whether it rises to the level of objectionable conduct.[12] An erroneous statement is inevitable in free debate, but such statements must be protected if freedom of expression is to retain the "breathing space" it needs to survive.[13] Racial protests and grievances—and those about sexual discrimination and other forms of alleged arbitrary treatment—are properly promoted, not smothered and suppressed, by the statutory scheme which we administer.[14] Further, placing the burden on the party seeking to have the election set aside and eliminating the requirement that the truthfulness of the racial remarks be established, diminishes the potential for wasteful litigation that is now present in this area.[15] For example, in applying Sewell, the courts have contributed to this wasteful litigation by increasing the complexity of the Board's test and by engaging in a convoluted analysis involving a number of factors beyond the existing requirement that the racial appeals be truthful and germane.[16] By applying the test I have set forth above, much of this unnecessary litigation will be eliminated.

Because the employer controls the employment relationship and, in almost all circumstances, possesses more economic power than does the individual employee,[17] the Board's concerns about racial appeals expressed in *Sewell* and *Allen-Morrison* have peculiar applicability to remarks of employers as opposed to those of unions and their representatives. In cases involving employers, like *Sewell* and *Allen-Morrison*, it is to be recalled, employers attempted to *divide* workers on the basis of racial appeals unrelated to working conditions and the workplace and to

[12] This view is consistent with the Board's refusal to inquire into the truth or falsity of parties' campaign statements in general or set aside elections on the basis of misleading campaign statements. *Midland National Life Ins. Co.*, 263 NLRB 127 (1982). Thus, I do not subscribe to the Sixth Circuit's view in *KI (USA) Corp. v. NLRB*, 35 F.3d 256, 260 (6th Cir. 1994) that "the *Midland* standard is the wrong one to apply to allegations of racial bias."

[13] *New York Times v. Sullivan*, 376 U.S. at 271–272 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). *Sewell* and *Allen-Morrison*, decided by the Board in 1962, could not take into account the relevance of *Sullivan* to this issue. Cf. *Carey v. Brown*, 447 U.S. 455 (1980) (Illinois statute unconstitutional because it discriminates among pickets based on the subject matter of their expression.).

[14] Cf. *Emporium Capwell Co. v. Western Addition Community Org*., 420 U.S. 50 (1975); *NLRB v. Tanner Motor Livery, Ltd*., 419 F.2d 216 (9th Cir. 1969); Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 Yale L.J. 46 (1969); and Gould, *Labor Arbitration of Grievance Involving Racial Discrimination*, 118 U. Pa. L. Rev. 40 (1969).

[15] See my dissent in *Flint Iceland Arena*, 325 NLRB 318 (1998), where I also urge the diminishment of potentially wasteful litigation within the context of non-Board settlements. Illustrative of a decision which substantially diminished litigation through its broad and clear mechanical rule relating to jurisdiction was *Management Training*, 317 NLRB 1355 (1995). The doctrine in *Management Training* has been approved in *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997), and in *Pikeville United Methodist Hosp. v. NLRB,* 109 F.3d 1146 (6th Cir. 1997), where we asserted jurisdiction over private employers. In my separate opinion in *Legal Aid Society of Alameda County*, 324 NLRB 796 (1997), I stated that I would overrule the Board's decision in *Detroit College of Business*, 296 NLRB 318 (1989), because its multi-factor test for determining whether professionals possess supervisory status which would exclude them from statutory coverage is confusing and improperly focused on the work of the professional rather than the work of the employee being supervised, and thus inconsistent with the Board's efforts to diminish wasteful and unnecessary litigation. Consistent with this view, I have also advocated that the promotion of voluntary recognition agreements in order to avoid unnecessary litigation. See *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844, 847–848 (1996) (Gould, W., concurring). The Board has concurred with this approach in its promotion of settlement agreements negotiated where a decertification petition has been filed and an incumbent union has an established relationship with the employer. *Douglas-Randall, Inc.*, 320 NLRB 431 (1995). This policy is the wellspring for the Board's rule giving the Board's administrative law judges authority to act as settlement judges. Under this rule, a judge "other than the trial judge" may be assigned to a case "to conduct settlement negotiations," provided all parties agree. Where "feasible," settlement conferences are held in person, and settlement judges may delve more deeply into all aspects of a case than the judge who will ultimately hear and decide the case absent settlement.

[16] See *Carrington S. Health Care Center v. NLRB*, 76 F.3d 802 (6th Cir. 1996), (In finding that the Board had improperly overruled the employer's objection without a hearing, the court considered additional evidence of preelection racial discord at the employer's facility, and found that despite references to legitimate campaign issues, the imagery of two cartoons distributed by the union could also be construed as invoking tokens of slavery and racial oppression and that a quote from Dr. Martin Luther King could be interpreted as being directed to a certain "people," i.e., the racial group at issue and therefore the quote has some relevance to whether racial polarization existed.); and *KI(USA) Corp. v. NLRB*, 35 F.3d 256 (6th Cir. 1994) (In applying *Sewell* standard, court considered not only whether union's racial appeal was germane to any campaign issues at the employer's facility and truthfully represented the employer's position on racial matters but also whether the employer had the opportunity to respond to the union's racial appeal and the difficulty of responding to such attacks at all.). See also *NLRB v. Katz*, 701 F.2d 703 (7th Cir. 1983); and *NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981). Insofar as the court's decisions in *Katz* and *Silverman's* rest upon the promotion of racial or ethnic hatred, I am in accord with setting aside an election on that basis.

[17] The employer wields considerable economic power over its employees who depend completely on their jobs for their livelihood and economic existence. As a result of this economic power, an employer's statement is imbued with a "force independent of persuasion." *NLRB v. Federbush Co., Inc.*, 121 F.2d 954, 957 (2d Cir. 1941). See also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (Any assessment of the precise scope of employer expression must be made in the context of its labor relations setting and any balancing of an employer's free speech right with the equal right of employees to freely associate must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.), and *NLRB v. Falk Corp.*, 102 F.2d 383, 389 (7th Cir. 1938) ("The position of the employer . . . carries such weight and influence that his words may be coercive when they should not be so if the relation of master and servant did not exist.").

frustrate the possibility of effective concerted activity.[18] Similar union appeals which are designed to divide workers through nostrums of racial hatred or to accomplish the same objective in the employer-employee relationship must be condemned under our Act as well. In this respect, the principles of *Sewell* and *Allen-Morrison* must be retained. But, generally speaking, union organizational efforts aimed at blacks and other racial minorities and women must necessarily focus, in part, upon grievances peculiar and unique to such groups, i.e., employment conditions which are attributable to racial inequities or what appear to be racial inequities and other forms of arbitrary treatment.

The facts of this case are illustrative. The Employer alleges objectionable conduct in the dissemination of a statement made by a unit employee in reference to the investigation of an alleged instance of sexual harassment between a black employee and a white employee. While the statement suggests a racial message, it also raises valid workplace issue. Appeals based on racial solidarity or expressions of grievance based on racial discrimination are indistinguishable from appeals to employees' economic and social self-interest which the Board has long recognized as a legitimate tactic in any union organizing campaign.[19] In *Novotel New York*,[20] the Board recognized that, under the statutory scheme of the Act, unions have an essential role in assisting workers in the exercise of their Section 7 rights to better their working conditions and, to fully play this role, unions engage in a broad range of activity on behalf of both the employees they represent as well as the employees they are seeking to organize.

In *Novotel*, the Board found that that a union's provision of legal services to employees they were seeking to organize including investigating, preparing, and filing a lawsuit asserting the employees' wage claims under the Fair Labor Standards Act was protected by the First Amendment and the Act and not an objectionable grant of benefit that would warrant setting aside the election.[21] In reaching this conclusion, the Board noted that, historically, unions had undertaken a wide variety of actions and tactics to protect and advance the rights of workers including training programs, litigation, and the advocacy and monitoring of legislation to advance their goals.[22] Relying on *NAACP v. Button*, one of the Supreme Court's decisions establishing that organizations which bring or financially support lawsuits seeking to vindicate the legal rights of their members or nonmembers are engaged in a constitutionally protected form of free speech safeguarded by the First Amendment,[23] the Board found that constitutional and statutory precedent provided protection for both members and nonmembers in the union's organizational campaign and that protection was not removed " . . . the moment the union took the next logical step and sought financially or otherwise to assist nonmembers in gaining access to the Courts for vindication of their lawful rights."[24]

In the instant case, the credited evidence established that the issues of common concern to employees included wages and benefits, worker safety, equal treatment of employees and unjust discharges of employees. The racial appeals in the Petitioner's handbill were thus clearly germane to the employer-employee relationship.

Suppose the Petitioner had instituted litigation or offered legal advice with or without the prospect of litigation to employees in the bargaining unit pursuant to Title VII of the Civil Rights Act of 1964 and related employment discrimination legislation. Should the election be set aside? *Novotel* make it clear that, unless the Board will treat employment discrimination differently than other employment problems and litigation or accord it less status, the answer is in the negative. The principles of *Novotel* make it clear that the promotion or acknowledgment of employee grievances, racial or otherwise, are appropriate under the Act.

While I agree that racial discrimination and sexual harassment are complex problems, the answer is not to discourage open debate where these issues concern employees' working conditions. These issues were not injected into the campaign by the Petitioner, but reflected an existing workplace concern. The reality of the workplace is that discussions between employees, unions, and management is frequently rough and tumble, but the Board cannot and should not function as a censor of these debates over issues germane to the employment relationship. Under my view, until the rhetoric reaches the point at which it is no longer relevant to the discussion of unionization and is intended only to promote an atmosphere of racial hatred, the Board should not condemn racial appeals.

Accordingly, I would retain the core of *Sewell* and *Allen-Morrison* but revise some aspects of the holdings of

[18] I would apply the standard of *Sewell* and *Allen-Morrison* to divisive and inflammatory comments even, in some circumstances, where the commentary relates to employment conditions. Cf. *United Packinghouse Workers v. NLRB*, 416 F.2d 1126 (1969), cert. denied 396 U.S. 903 (1969).

[19] See *Coca-Cola Bottling Co.*, 273 NLRB 444, 445 (1984) (Regardless of racial implication, the issue of whether employees have been unfairly treated, for whatever the reason, is always a legitimate topic of discussion in a union campaign.).

[20] 321 NLRB 624 (1996).

[21] The union began an organizing drive among hotel workers and during the campaign, the union received many complaints about alleged irregularities in the payment of overtime wages to the workers. *Id*. a 624. A suit alleging violations of the Fair Labor Standards Act of 1938 was filed by the union on behalf of the employees and the issue presented to the Board was whether the union's litigation was a "benefit" which interfered with the conduct of the election.

[22] 321 NLRB at 629–630.

[23] 371 U.S. 415 (1963). See also *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964); *Mine Workers District 12 v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); and *In Re Primus*, 435 U.S. 412 (1978).

[24] 321 NLRB at 632.

those cases. I would adhere to the principles of free speech and freedom of association adumbrated by the Supreme Court in *NAACP vs. Alabama*[25] and *NAACP v. Button*.[26] I would remain faithful to the approach taken by our Board 2 years ago when we applied those principles to our Act in *Novotel*.

Therefore, I join my colleagues in adopting the hearing officer's recommendation to overrule the employer's objections to the election and certifying the Petitioner. In so doing, I vote for the principles of free speech and employee free choice promoted and sanctioned by the Act and the First Amendment.

APPENDIX

OBJECTION 2

The Employer claims that employees were denied a free and uncoerced choice regarding unionization because the Petitioner promulgated "campaign propaganda deliberately calculated to overemphasize and exacerbate racial/religious tensions among employees by inflammatory appeals" which destroyed the prerequisite laboratory conditions and affected the outcome of the election.

Counsel for the Employer claims that one such incident occurred when the Petitioner distributed its September 11,. issue of the 'The Union Issue" to employees. (Employer's Exhibit 3)[8] The handbill in question has a picture of Harrell and a lead caption "Why was James Harrell Fired?" The article contains a quote from Harrell, who is black, that he admittedly made to the Director of Human Resources, Randy Rocha, who is white.[9] The Employer claims that Harrell's statement "Black folk have been wrongly touched by whites for over 300 years" is "an inflammatory appeal to racial prejudice." Rocha met with Harrell while conducting an investigation of an alleged incident of sexual harassment concerning a black woman who had complained about a white employee who had touched her. Harrell was terminated by the Employer on August 21, "because he interfered with a sexual harassment investigation . . . ." The foregoing termination is subject of an unfair labor practice charge being investigated at the time of the hearing. Harrell, who became a paid employee of the Petitioner after he was terminated by the Employer, admitted that he met with approximately 200 of the Employer's employees and informed them that he had been wrongfully terminated. He also told the employees that he had apprised "[m]anagement that black folk had been wrongfully judged by white folks for over three hundred years." Counsel for the Employer contends in his brief that Harrell did not utter the statement in question to Rocha during their meeting.

Employer's Counsel also notes that officers and agents of the Petitioner actively sought the support of black employees, especially the 188 new employees who were mostly black, according to Petitioner's monthly magazine. (Employer's Exhibit 2) "Adding fuel to the fire," Employer Counsel cites is the Petitioner's "enlisting the support of the Memphis Baptist Ministerial Association, [hereinafter known as the Association] an organization of local black ministers . . . ." The evidence indicates that Harrell, Petitioner's organizer Curtis Hawkins, and two other representatives for the Petitioner, attended the meeting with the Association. Hawkins stated, and Harrell corroborates, that he spoke to the Association on behalf of the group and asked them to support the workers. The Petitioner prepared a letter to the Employer on the Association's letterhead.

Reverend Donald Castle, secretary for the Association, stated that every Tuesday the Association meets and it is common for politicians, business people, and others to speak at the meeting. Castle was unsure if the meeting occurred on September 16 or before, but he noted that someone read to the group for a few minutes and then a vote was taken to determine if the Association would support the employees, which they did.

Employer's Exhibit 7 is a letter dated September 16 sent to the President of the Employer from the Association along with six pages of member's signatures. The letter noted that a group of clergy had recently met and discussed problems the Employer's employees were having and the Association proposed that in the best interest of the employees that the Employer adopt a "Fair Campaign Practice Pledge," set forth below.

> Allow union representatives and supporters to have equal time at any meeting employees are required to attend and/or where unions are discussed,
>
> Give union supporters the same opportunity as the company to post union material or distribute material without harassment,
>
> Allow employees to express their opinions freely and openly, without fear of company intimidation or discipline, about their pro-union views,
>
> Treat all employees with respect during the union campaign, allowing a free and unencumbered election. When union representation is decided, Sheperd immediately enter into fair negotiation with the employees' chosen representatives aiming at reaching a mutually agreed upon collective bargaining agreement.

The Petitioner distributed Employer's Exhibit 7 to employees during the campaign. Whereupon, the Employer responded with a handbill of its own. That handbill, Petitioner's Exhibit 12, indicates that the Petitioner failed to inform the Association of the "**TRUTH**" that the rerun election is due to ". . . **certain conduct of the Union interfered with the employees' exercise of a free and reasonable choice**. . . ." (emphasis not added) Moreover, the Employer's handbill informs employees that the Petitioner failed to inform the Association that two of its supporters were discharged for threats and for racial harassment and "[i]f the UPIU will intentionally misrepresent the true facts to the Memphis Baptist Ministerial Association we can only imagine what this group has said to you." The Employer notes on the handbill that it will abide by the National Labor Relations Act and asked its employees to support it and vote no.

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[25] 357 U.S. 449 (1958) (Immunity from state scrutiny of membership lists which NAACP claimed on behalf of its Alabama members was so related to the right of members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.).

[26] 371 U.S. 415 (1963). Cf. H. Kalven, the Negro and the First Amendment (Ohio State University Press 1965).

[8] Counsel for the Employer inadvertently refers to Employer's Exh. 3 as Employer's Exh. 2 in his brief.

[9] Rocha served as Employer's representative at the hearing, but did not testify.

The Employer contends that race was one of the main issues in the campaign and supports that contention with the testimony of Mae Francis White, a black employee, who stated that Harrell's remark was talked about every day. Another witness for the Employer was Linda Mabary, a white employee, who noted that she thought Harreil's remark in the "The Union Issue" was interjecting race into the campaign. However, Employer witness Kevin Hyman, a black employee, testified that he did not discuss the remark with anyone and that it did not impact him at all. Marie Williams, a black employee, testified that Harrell's remark did not affect her at all. In fact, none of the Employer's witnesses testified that Harrell's remark altered the way they were going to vote.

Ron Spann, union organizer, testified that such issues as "seniority, equal pay for equal work, equal treatment to employees, and unjust discharges" were prevalent throughout the campaign. Spann noted that one of the main issues in the campaign was employee safety since several employees had been injured. In addition, numerous documents or handbills were distributed to the employees in one form or another from the Petitioner or the Employer (Emp.Exhs. 1, 3, 6; P. Exhs. 4–44, 46) concerning various campaign issues. Also, the text of a video transcript shown to employees by the Employer (P. Exh. 45) demonstrates that wages, job benefits, the future of the facility if the Petitioner wins the election, the amount of dues to be paid to the Petitioner and how that money is spent by the Petitioner were all issues that concerned the Employer.

Counsel for the Employer contends that "[t]he sole purpose for publishing Harrell's *alleged statement* to the white Human Resource Manager and about a white employee touching a black employee was to suggest alleged mistreatment of black persons by white persons." (emphasis not added) The Employer also contends that the Petitioner promoted Harrell's remarks and sought the aid of the Association in order to persuade black voters from voting for the Employer. Thus, the Employer has established a prima facie case that the Petitioner used "inflammatory appeal" to racial feelings thereby shifting the burden to the Petitioner to "show that its remarks were 'truthful and germane.'" See *Sewell Mfg. Co*., 138 NLRB 66 (1962)

Based on the totality of the evidence. l do not find Harrell's remark, as quoted above, was so offensive and inflammatory that a fair election was impossible. See *Catherine's Inc.*, 316 NLRB 186 (1995); *Coca-Cola Bottling Co*., 273 NLRB 444 (1984); *Vitek Electronics*, 268 NLRB 522, 527–28 (1984) See generally, *Case Farms of North Carolina* 320 NLRB No. 97 (1996), enfd 128 F.3d 841 (4th Cir. 1997); *Englewood Hospital*, 318 NLRB 806, 807 (1995); *Brightview Care Center, Inc*., 292 NLRB 352 (1989).

The Employer claims that Harrell did not make the remark in question to Rocha and thus the Petitioner disseminated false information. However, I credit Harrell's unrebutted testimony wherein he admitted he made the remark which the Petitioner subsequently disseminated to employees via a handbill.

Harrell expressed his personal opinion based upon his life experiences when he met with Rocha. The statement Harrell made to Rocha that "Blacks have been wrongly touched by whites for 300 years" conjures up thoughts of a master-slave relationship whether on a plantation, in a factory, or in society in general. I am mindful of historical facts that inform us that the type of incident Harrell was referring to has certainly occurred in the past, and while things have recently improved, there is no reason to believe that such repugnant conduct has been eradicated. Thus, Harrell's statement merely placed these matters into a historical setting well understood by all, blacks in particular. See *Coca-Cola*, supra.

The Employer further claims that the Petitioner embarked on a campaign which sought to overstress and exacerbate racial feelings with irrelevant and inflammatory appeals to racial prejudices. See *Sewell*, supra. The credited evidence is overwhelming that wages and benefits, worker safety, and the impact the selection of a union will have on the employees were the main issues in the campaign. Other issues in the campaign consisted of equal treatment of employees and unjust discharges of employees. Harrell's remark to Rocha during an investigation of alleged sexual harassment and Harrell's subsequent termination were germane to the campaign and therefore permissible conduct. See *Beatrice Grocery Products*, 287 NLRB 302 (1987). It should also be noted that there is no evidence that Harrell's remark caused one employee to alter how they were going to vote.

As for the Employer's claim that the Association's letter sent to the Employer and distributed to employees constitutes an appeal to racial and religious prejudices, I fail to discern how the letter could have reasonably tended to destroy the atmosphere necessary for the exercise of an employee's free choice thereby interfering with the election. I find that the letter in question was not an attempt to inflame racial or religious prejudice or to pit one race against another or one religion against another. In fact, the letter does not insult or slur any racial group or any religious group. Rather, the Association's letter merely requests the Employer to conduct a fair election and delineates how that can be accomplished. Moreover, the Employer distributed a handbill of its own regarding the Association's letter. With a handbill from each party, the employees should be viewed as "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." *Midland National Life Insurance Co.*, 263 NLRB 127, 132 (1982), citing *Shopping Kart Food Markets*, 228 NLRB 1311, 1313 (1977).

The Employer further contends in a footnote that the Petitioner's meeting with "Shep Wilburn, a well-known, black politician in the Memphis community" and soliciting the use of his name "contributed to the racial issue fanned by the [Petitioner]." Along that same thought, the Employer alleges that the Petitioner soliciting a letter from and later distributing a letter from U.S. House of Representative Harold E. Ford, Jr., a black congressman, to the Employer's President Suda Bhagwat, further "heighten[ed] and exacerbate[d]" racial tensions. (Emp. Exh. 5.) The involvement of the two previously noted black men in the campaign does not under these conditions "heighten and exacerbate" racial tensions. See *Baltimore Luggage Co*., 162 NLRB 1230 (1967). It appears from the totality of the Employer's evidence, that any connection, however tenuous, between prominent black individuals or prominent black associations and the Petitioner's campaign ipso facto establishes an "inflammatory appeal to racial prejudices" since the majority of its employees are black. I am unaware of any case law that supports that proposition. Therefore, I recommend that the Employer's Objection 2 be dismissed in its entirety.